Mohd Isha bin Awang v Mohamad Idris bin Seramal Baris

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-2426–12 OF 2018
KAMALUDIN MD SAID, ABU BAKAR AND GUNALAN JJCA
5 AUGUST 2020

Civil Procedure — Appeal — Interference by appellate court — Whether there is an appealable error in the decision of the trial judge that merits appellate intervention — Whether trial judge misdirected himself in fact and in law by allowing plaintiff's claim

Evidence — Documentary evidence — Admissibility of — Civil case — Whether documents admitted in evidence and marked as exhibits need to be proven — Whether order for judicial separation issued by Syariah Court of Appeal in the State of Kedah was sufficient evidence that marriage was dissolved — Whether judgment of court is a public document — Whether documents tendered in evidence were issued by Government department — Whether documents show judicial and official acts have been performed — Whether order of Syariah Court of Appeal is presumed to be valid until it is proved otherwise — Whether there was any evidence that order was fraudulent document or has been falsified — Whether trial judge erred in concluding that there was no satisfactory evidence to show that marriage between the plaintiff and the second defendant had been dissolved by judicial separation (faraq)

Mohamad Idris bin Seramal Baris (the plaintiff) and Norieta bt Osman (the second defendant) were legally married on 27 February 1992. Thereafter they separated and the second defendant is now with Mohd Isha bin Awang (the first defendant), an associate professor at the Universiti Utara Malaysia. The plaintiff alleged that the first defendant had caused a breakdown of his familial relationship with the second defendant and caused him to suffer losses and emotional distress. The plaintiff commenced an action against the defendants seeking general damages, special damages, aggravated damages and exemplary damages under the law of torts. In their defence the defendants contended that there was no valid marriage between the plaintiff and the second defendant due to an order for judicial separation (*faraq*) granted in 1993 by the Syariah Court in the state of Kedah. The first defendant then filed a counterclaim against the plaintiff. The first defendant alleged that the plaintiff had written to the Minister of Higher Education claiming that the first defendant had enticed and cohabited with his wife, the second defendant. It was the first defendant's contention that the letter, which was copied to the Secretary-General of the Ministry of Higher Education, the Director General of the Ministry of Higher

Education Department (the DG) and the Vice-Chancellor of the Universiti Utara Malaysia was defamatory of him and had caused his reputation to be in disrepute. The trial judge found that there was no satisfactory evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation (*faraq*). As such, the High Court held that on the balance of probabilities, the plaintiff had succeeded in proving his case against the defendants for the alleged enticement. At the same time, the trial judge found that the plaintiff had failed to prove that he had suffered losses and emotional distress arising out of the said enticement. He thus awarded nominal damages of RM1,000 to the plaintiff with RM20,000 costs. Having found in favour of the plaintiff, the trial judge held that the letter written by the plaintiff to the DG could not be defamatory of the first defendant on the basis of justification. Consequently, he dismissed the first defendant's counterclaim with RM10,000 costs. The defendants appealed on the grounds that the trial judge had misdirected himself in fact and in law by allowing the plaintiff's claim and dismissing the first defendant's counterclaim. The defendants submitted that the trial judge had, inter alia, failed to take into account and give due consideration to the order for judicial separation between the plaintiff and the second defendant (the order for judicial separation) issued by the Syariah Court of Appeal in the State of Kedah and failed to take into account and give due consideration to the fact that the Chief Registrar of the Syariah Judicial Department Negeri Kedah had confirmed that the order of judicial separation is a valid document. The first defendant argued that the order for judicial separation was made and issued by public officials in the course of their judicial and official acts and that once this document was admitted and marked as an exhibit in the trial, the court may presume the existence of facts in relation to the case.

Held, allowing the appeal with costs of RM15,000:

(1) After careful reading of the record of appeal and the grounds of judgment of the trial judge it was clear that there was an appealable error in the decision of the trial judge that merits intervention by the appellate court. It is trite law that where a document has been properly proved it must be marked as an exhibit and the documents which have been admitted need not be proved, as provided in s 58 of the Act. In the present case, the trial judge had clearly stated that the admissibility of documents referred to by the defendants to show that the marriage between the plaintiff and second defendant has been dissolved by judicial separation (*faraq*) was not an issue. If the admissibility of the documents was not an issue and they were marked as exhibits, it rendered the documents as valid and the contents as proved. In such a case, the court must give due consideration the same and the contents stated therein are true and become undisputed facts. The facts in the documents show that the marriage between the plaintiff and second defendant had been dissolved by judicial separation

(*faraq*) (see paras 15 & 17–18).

(2) The documents admitted in evidence and marked as exhibits were the judgment or order by the Syariah Court of Appeal in the state of Kedah Darul Aman pronouncing the marriage between the plaintiff and the second defendant as not valid according to 'syarak' (exh D41); the letter from the Chief Registrar of the Syariah Judicial Department Negeri Kedah Darul Aman to the second defendant confirming that the order of the Syariah Court of Appeal in Kedah is a valid order (exh D44); and an extract of marriage certificate between the plaintiff and the second defendant which contains an endorsement at the bottom of the page stating that the marriage 'telah difaraqkan' by the Kadi Daerah Balik Pulau in compliance with the order of the Syariah Court of Appeal (exh D45). These documents showed that the marriage between the plaintiff and the second defendant has been dissolved by judicial separation (*faraq*). In the circumstances, the trial judge erred in concluding that there was no satisfactory evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation (*faraq*) in the absence of the original record. In circumstances where a dispute arises as to the endorsement in the extract of marriage certificates (D45), the trial judge may enquire the presence of such endorsement, to satisfy himself. Had he done this, he would have found that the endorsement was entered based on the order of the Syariah Court of Appeal (D41) as to which he had no issue on its validity. The trial judge should have considered all the documents produced before him in light of the dispute to assertain whether the marriage had in fact been dissolved by judicial separation. Even though the original marriage certificate with the endorsement (D45) may not be in the possession or custody of Chief Registrar of the Syariah Judicial Department Negeri Kedah, it did not mean the court must totally shut its door to other supporting documents which can establish the history of the case (see paras 19–21 & 23–24)

(3) A judgment of the court is a public document under s 74 of the Act. Those documents are relevant public records made in the performance of a public duty under s 35 of the EA. Thus, they are admissible as an exception to the hearsay rule. In the present case, the documents tendered in evidence were documents issued by the relevant authorities and are in fact, documents issued by a government department. The documents show the judicial and official acts which have been performed. It is trite law that the court may presume the existence of any fact which it thinks likely to have happened in relation to the facts of the particular case that judicial and official acts have been regularly performed. Further, in the present case, the documents were admitted and marked as exhibits and the judgment does not show that the admissibility of those documents had been objected to by the plaintiff. In the circumstances, the

presumption under s 114(e) of the Act is applicable to those documents. Thus, the order of Syariah Court of Appeal (D41) adjudicating that the marriage between the plaintiff and second defendant is not valid according to 'syarak' must be presumed to have been made within the court's powers and is valid until it is proved otherwise. There is no evidence to suggest that D41 is a fraudulent document or has been falsified and the order remains valid until set aside (see paras 27–29).

(4) The trial judge has ruled that the first defendant's counterclaim for defamation is dependent on whether or not the plaintiff's claim could succeed. If the plaintiff succeeds in his claim, the letter written by the plaintiff could not be defamatory to the first defendant on the basis of justification. Since the appeal has been allowed the appeal, the case was remitted to the High Court for assessment of damages for the first defendant's counterclaim (see para 36).

[Bahasa Malaysia summary

Mohamad Idris bin Seramal Baris (plaintif) dan Norieta bt Osman (defendan kedua) telah sah berkahwin pada 27 Februari 1992. Mereka telah bercerai selepas itu dan defendan kedua kini bersama Mohd Isha bin Awang (defendan pertama), seorang profesor madya di Universiti Utara Malaysia. Plaintif mendakwa bahawa defendan pertama telah menyebabkan keretakan hubungan kekeluargaan dengan defendan kedua dan menyebabkan beliau mengalami kerugian dan tekanan emosi. Plaintif memulakan tindakan terhadap defendan dengan menuntut ganti rugi am, ganti rugi khas, ganti rugi teruk dan ganti rugi teladan di bawah undang-undang tort. Dalam pembelaan mereka, pihak defendan berpendapat bahawa tiada perkahwinan yang sah antara plaintif dan defendan kedua oleh kerana terdapat perintah untuk pemisahan kehakiman (*faraq*) yang diberikan pada tahun 1993 oleh Mahkamah Syariah di negeri Kedah. Defendan pertama kemudiannya memfailkan tuntutan balas terhadap plaintif. Defendan pertama mendakwa bahawa plaintif telah menulis surat kepada Kementerian Pengajian Tinggi dengan mendakwa bahawa defendan pertama telah memikat dan bersekedudukan dengan isterinya, defendan kedua. Ianya adalah dakwaan defendan pertama bahawa surat tersebut, yang telah disalinkan kepada Ketua Setiausaha Kementerian Pengajian Tinggi, Ketua Pengarah Kementerian Pengajian Tinggi (DG) dan Naib Canselor Universiti Utara Malaysia adalah bersifat fitnah terhadapnya dan telah menyebabkan reputasi beliau rosak. Hakim perbicaraan mendapati bahawa tidak ada bukti yang menunjukkan bahawa perkahwinan antara plaintif dan defendan kedua telah berakhir oleh pemisahan kehakiman (*faraq*). Oleh yang demikian, Mahkamah Tinggi berpendapat bahawa berdasarkan imbangan kebarangkalian, plaintif telah berjaya membuktikan kesnya terhadap defendan atas tuduhan tersebut. Pada saat yang sama, hakim perbicaraan mendapati bahawa plaintif telah gagal membuktikan bahawa beliau telah mengalami kerugian dan tekanan emosi

akibat dari tuduhan tersebut. Oleh itu, beliau memberikan ganti rugi nominal sebanyak RM1,000 kepada plaintif dengan kos RM20,000. Melalui dapatan terhadap plaintif, hakim perbicaraan memutuskan bahawa surat yang ditulis oleh plaintif kepada DG bukanlah memfitnah defendan pertama berdasarkan justifikasi. Lanjutan itu, beliau menolak tuntutan balas defendan pertama dengan kos RM10,000. Pihak defendan membuat rayuan dengan alasan bahawa hakim perbicaraan telah terkhilaf pada fakta dan undang-undang dengan membenarkan tuntutan plaintif dan menolak tuntutan balas defendan pertama. Defendan berpendapat bahawa hakim perbicaraan antara lain, gagal mengambilkira dan memberikan pertimbangan yang sewajarnya terhadap perintah pemisahan kehakiman antara plaintif dan defendan kedua (perintah pemisahan kehakiman tersebut) yang dikeluarkan oleh Mahkamah Rayuan Syariah di Negeri Kedah dan gagal mengambil kira dan memberikan pertimbangan yang sewajarnya terhadap kenyataan bahawa Ketua Pendaftar Jabatan Kehakiman Syariah Negeri Kedah yang telah mengesahkan bahawa perintah pemisahan kehakiman adalah dokumen yang sah. Defendan pertama berpendapat bahawa perintah pemisahan kehakiman telah dibuat dan dikeluarkan oleh pegawai kerajaan dalam bidang kehakiman dan tugas rasmi mereka dan bahawa setelah dokumen ini diterima dan ditandakan sebagai ekshibit semasa perbicaraan, mahkamah dapat menganggap wujudnya fakta berhubung dengan kes tersebut.

Diputuskan, membenarkan rayuan dengan kos RM15,000:

(1) Setelah membaca dengan teliti rekod rayuan dan alasan penghakiman hakim perbicaraan, jelas bahawa terdapat kekhilafan yang harus dirayu dalam keputusan hakim perbicaraan yang layak mendapat campur tangan oleh Mahkamah Rayuan. Ianya adalah undang-undang yang mantap bahawa di mana suatu dokumen telah dibuktikan dengan sempurna, ia mesti ditandakan sebagai ekshibit dan dokumen-dokumen yang telah ditandakan tidak perlu dibuktikan, seperti yang diperuntukkan dalam s 58 Akta tersebut. Dalam kes semasa, hakim perbicaraan telah dengan jelas menyatakan bahawa penerimaan dokumen yang dirujuk oleh defendan untuk menunjukkan bahawa perkahwinan antara plaintif dan defendan kedua telah berakhir oleh pemisahan kehakiman (*faraq*) bukanlah suatu isu. Sekiranya penerimaan dokumen tidak menjadi isu dan dokumen tersebut ditandakan sebagai ekshibit, dokumen tersebut menjadi sah dan kandungannya dapat dibuktikan. Dalam kes seperti itu, mahkamah harus memberikan pertimbangan yang wajar dan kandungan yang dinyatakan adalah benar dan menjadi fakta yang tidak dipertikaikan. Fakta-fakta melalui dokumen tersebut menunjukkan bahawa perkahwinan antara plaintif dan defendan kedua telah berakhir dengan pemisahan kehakiman (*faraq*) (lihat perenggan 15 & 17–18).

(2) Dokumen yang diterima masuk sebagai bukti dan ditandakan sebagai

ekshibit adalah penghakiman atau Perintah oleh Mahkamah Rayuan Syariah di negeri Kedah Darul Aman yang menyisytiharkan perkahwinan antara plaintif dan defendan kedua tidak sah menurut 'syarak' (eksh D41); surat dari Ketua Pendaftar Jabatan Kehakiman Syariah Negeri Kedah Darul Aman kepada defendan kedua yang mengesahkan bahawa Perintah Mahkamah Rayuan Syariah di Kedah adalah Perintah yang sah (eksh D44); dan ekstrak surat nikah antara plaintif dan defendan kedua yang mengandungi pengesahan di bahagian bawah mukasurat yang menyatakan bahawa perkahwinan tersebut 'telah difaraqkan' oleh Kadi Daerah Balik Pulau menurut Perintah Mahkamah Rayuan Syariah (eksh D45). Dokumen-dokumen ini menunjukkan bahawa perkahwinan antara plaintif dan defendan kedua telah berakhir oleh pemisahan kehakiman (*faraq*). Dalam keadaan tersebut, hakim perbicaraan terkhilaf dalam membuat kesimpulan bahawa tidak ada bukti yang munasabah untuk menunjukkan bahawa perkahwinan antara plaintif dan defendan kedua telah berakhir oleh pemisahan kehakiman (*faraq*) tanpa rekod asalnya. Dalam keadaan di mana timbul pertikaian mengenai pengesahan dalam ekstrak surat nikah (D45), hakim perbicaraan haruslah memohon untuk mendapatkan pengesahan tersebut, untuk memuaskan dirinya. Sekiranya beliau berbuat demikian, beliau akan mendapati bahawa pengesahan tersebut dibuat berdasarkan Perintah Mahkamah Rayuan Syariah (D41) yang mana beliau tidak mempunyai sebarang isu mengenai kesahihannya. Hakim perbicaraan harus mempertimbangkan kesemua dokumen yang dikemukakan di hadapannya terhadap pertikaian tersebut untuk memastikan sama ada pernikahan tersebut sebenarnya telah berakhir oleh pemisahan kehakiman. Walaupun sijil nikah asal dengan pengesahan (D45) mungkin tidak berada dalam kawalan dan jagaan Ketua Pendaftar Jabatan Kehakiman Syariah Negeri Kedah, ianya tidak bermaksud mahkamah mesti mengendahkan sepenuhnya dokumen sokongan lain yang dapat membuktikan asal usul kes tersebut (lihat perenggan 19–21 & 23–24).

(3) Penghakiman oleh mahkamah adalah dokumen awam di bawah s 74 Akta tersebut. Dokumen tersebut adalah rekod awam yang wajar yang dibuat dalam pelaksanaan tugas awam di bawah s 35 AK. Oleh itu, ianya adalah dapat diterima sebagai pengecualian dari peraturan dengarcakap. Dalam kes semasa, dokumen yang dikemukakan sebagai bukti adalah dokumen yang dikeluarkan oleh pihak berwajib dan berdasarkan fakta, dokumen yang dikeluarkan oleh sebuah jabatan kerajaan. Dokumen tersebut menunjukkan dapatan kehakiman dan rasmi yang telah dibuat. Ianya adalah undang-undang yang mantap bahawa mahkamah haruslah menganggap wujudnya fakta yang menurutnya mungkin telah berlaku berkait dengan fakta-fakta tertentu kes yang mana dapatan kehakiman dan rasmi telah dilakukan secara sempurna. Seterusnya, dalam kes

semasa, dokumen-dokumen tersebut telah diterima dan ditandakan sebagai ekshibit dan penghakiman tersebut tidak menunjukkan bahawa penerimaan dokumen-dokumen tersebut telah dibantah oleh plaintif. Dalam keadaan tersebut, anggapan di bawah s 114(e) Akta tersebut boleh digunapakai untuk dokumen-dokumen tersebut. Oleh yang demikian, Perintah Mahkamah Rayuan Syariah (D41) yang memutuskan bahawa perkahwinan antara plaintif dan defendan kedua tidak sah menurut 'syarak' haruslah dianggap telah dibuat dalam bidang kuasa mahkamah dan sah sehingga dibuktikan sebaliknya. Tidak ada bukti yang menunjukkan bahawa D41 adalah dokumen palsu atau telah dipalsukan dan perintah tersebut kekal sah sehinggalah ianya diketepikan (lihat perenggan 27–29).

(4) Hakim perbicaraan telah memutuskan bahawa tuntutan balas fitnah defendan pertama bergantung kepada sama ada tuntutan plaintif berjaya atau tidak. Sekiranya plaintif berjaya dalam tuntutannya, surat yang ditulis oleh plaintif bukanlah fitnah terhadap defendan pertama atas dasar justifikasi. Oleh sebab rayuan dibenarkan, maka kes diserahkan kembali Mahkamah Tinggi untuk penaksiran ganti rugi bagi tuntutan balas defendan pertama (lihat perenggan 36).]

Cases referred to

Commissioners of the Municipality of Malacca v Sinniah [1974] 1 MLJ 77 (refd)
Dow Jones Publishing Company (Asia) Inc v Attorney General [1989] 2 MLJ 385, CA (refd)
In the matter of Enactment No 10 of 1922, the judgments (reciprocity) Enactment; Ho Hong Bank Ltd v Ho Kai Neo & another [1932] 1 MLJ 76 (refd)
Kaliammal a/p Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors [2012] 2 SHLR 1; [2011] 2 CLJ 165, CA (refd)
Loo Keck Leong v PP [1992] 2 MLJ 177, SC (refd)
Mohd Nazir bin Badar Shair v Timbalan Menteri Dalam Negeri [2000] 2 MLJ 559, HC (refd)
Rengasamy Pillai v Comptroller of Income Tax [1970] 1 MLJ 233, PC (refd)
Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun [1981] 1 MLJ 201, FC (refd)
Yeak Chie Chai v Gan Bee Aik [1984] 1 MLJ 305 (refd)
Zainal bin Kuning & Ors v Chan Sin Mian Michael & Anor [1996] 3 SLR 121, CA (refd)

Legislation referred to

Evidence Act 1950 ss 35, 74, 78, 90, 114(e)

Appeal from: Civil Suit No PA-22NCVC-75–04 of 2016 (High Court, Pulau Pinang)

Borhanudeen Abdul Wahid (Burhan & Co) for the appellant.
Imran Mohd Farok (Roshidah Osman with him) (Roshidah Osman & Partners) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] The first appellant is the first defendant whereas the respondent is the plaintiff in an action brought by the plaintiff against the first and the second defendants in the High Court at Penang.

[2] The plaintiff alleges that the first defendant had enticed his wife, the second defendant away from the matrimonial home and had caused a breakdown of his familial relationship with the second defendant causing the plaintiff to suffer losses and emotional distress. The plaintiff claims against the defendants for general damages, special damages, aggravated damages and exemplary damages under the law of torts.

[3] The plaintiff married the second defendant on 27 February 1992 and up to 7 May 2015, the second defendant left the matrimonial home and as of the date of trial, she had not returned. The first defendant is an associate professor at the Universiti Utara Malaysia.

[4] The defendants contended that there was no valid marriage between the plaintiff and the second defendant due to an order for judicial separation (*faraq*) granted in 1993 by the Syariah Court in the state of Kedah. The first defendant had filed a counterclaim against the plaintiff. The plaintiff wrote a letter dated 15 August 2015 to the then Minister of Higher Education which alleged that the first defendant had enticed and cohabited with his wife, the second defendant. The letter was copied to: (i) the Secretary-General of the Ministry of Higher Education; (ii) the Director General of the Ministry of Higher Education Department; and (iii) the Vice-Chancellor of the Universiti Utara Malaysia. The first defendant claims that the contents of the letter are not true and defamatory of him and had caused his reputation to be in disrepute.

[5] The High Court allowed the plaintiff's claim and awarded the plaintiff nominal damages in the sum of RM1,000 with RM20,000 costs subject to allocator whereas plaintiff's claim for exemplary damages was not allowed. The first defendant's counterclaim was dismissed with RM10,000 cost subject to allocator.

[6] Aggrieved by the said decision of the High Court, the first defendant appealed to the Court of Appeal.

THE DECISION OF HIGH COURT

[7] The learned JC was of the considered view that the evidence of DW2 is most crucial. The learned JC found that DW2 himself had no means to authenticate the documents which he had examined and in the circumstances, the court could not attach much weight to those documents to prove that the marriage has in fact been so dissolved by judicial separation against the undisputed fact that both the plaintiff and the second defendant are legally married in the year 1992.

[8] The learned JC was also of the considered view that the presumption under s 90 of the Evidence Act 1950 could avail the defendant because it has not been shown that those documents are produced from the proper custody of DW2 since DW2 himself confirms that the record has been disposed of and that he merely examined the documents produced by the second defendant of which he has no means to ascertain if they are in fact genuine documents.

[9] Based on the aforesaid, the learned JC made the finding that there is no satisfactory evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation (*faraq*). On the balance of probabilities, the court found that the plaintiff has succeeded in proving his case against the defendants for the alleged enticement.

[10] In respect of damages, the learned JC found that the plaintiff had failed to prove that he had suffered losses and emotional distress arising out of the said enticement. The court awarded nominal damages of RM1,000 to the plaintiff with RM20,000 costs subject to allocator.

[11] The learned JC concluded that the first defendant's counterclaim for defamation is dependent on whether or not the plaintiff's claim could succeed if the plaintiff succeeds in his claim, then the letter written by the plaintiff could not be defamatory on the first defendant on the basis of justification. Having found in favour of the plaintiff, the learned JC dismissed the first defendant's counterclaim with cost of RM10,000 subject to allocator.

THE GROUNDS OF APPEAL

[12] In the memorandum of appeal, the first defendant states that the learned JC has misdirected himself in fact and in law:

(a) by allowing the plaintiff's claim and dismissing the first defendant's counterclaim;

(b) when he made the finding that the plaintiff has proven his claim on the balance of probability against the first defendant;

(c) when he failed to take into account and give due consideration to the fact that the plaintiff and the second defendant were lawful husband and wife at the time of the alleged tort of enticement;

(d) in failing to take into account and give due consideration to the order for judicial separation between the plaintiff and the second defendant issued by the Syariah Court of Appeal in the State of Kedah Darul Aman (D41);

(e) in failing to take into account and give due consideration to the fact that the Chief Registrar of the Syariah Judicial Department Negeri Kedah Darul Aman had confirmed that D41 is a valid document issued by the Syariah Court of Appeal in the State of Kedah Darul Aman (D44);

(f) by compelling or putting the burden on the first defendant to call the Judges of Syariah Court of Appeal in the State of Kedah Darul Aman as the maker of D41 to give evidence for the purpose of confirming D41 and its contents; and

(g) when he made the finding that the elements of the tort of enticement were present even though the evidence by the second defendant and the first defendant that the second defendant left the house on her own free will was never challenged during cross-examination to prove that the first defendant had enticed the second defendant.

THE APPEAL

[13] We heard the appeal where parties presented their oral submissions and also relied on their written submissions.

[14] The first defendant raised a pertinent point that the presumption under s 114(e) of the Evidence Act 1950 ('the EA') which says that the court may presume that judicial and official acts have been regularly performed applies to the documents produced in court. He argued that those documents were made and issued by public officials in the course of their judicial and official acts. Since those documents were admitted and marked as exhibits, the court may presume the existence of facts in relation to the case. The first defendant submitted that had the learned JC invoked the presumption under s 114(e) of the EA, he would have arrived at a correct decision and held that the marriage between the plaintiff and second defendant had been dissolved by judicial separation (*faraq*). Therefore the claim by the plaintiff that the first defendant has enticed his wife (the second defendant) should fail.

[15] We considered the submissions and after careful reading of the record of appeal and the grounds of judgment of the learned JC, we found there is an appealable error in the decision of the learned JC that merits intervention by

this court. It is our unanimous decision that the first defendant's appeal ought to be allowed. The decision of the learned judge is set aside. We award costs of RM15,000 to the first defendant subject to allocator. The case is sent back to the High Court for assessment of damages in respect of the first defendant's counterclaim.

THE DECISION OF THIS COURT

[16] Paragraph 58 of the learned JC's grounds of judgment referred by the first defendant reads as follows:

> ... [58] *The admissibility of the documents referred by the defendant to show that the marriage between the plaintiff and second defendant has been dissolved by judicial separation (faraq) is not in issue*. However, in considering to the weight to be given to those documents in light of the extract dated 06-01-2017 of the marriage certificate [Exhibit P33] and the marriage certificate certificate [Exhibit P32] which both do not bear the dissolution of marriage (faraq) endorsement, I am of the considered view that the evidence of DW2 is most crucial. It is clear that DW2 had no means to authenticate the documents which he had examine and, in the circumstances, I could not attach much weight to those documents to prove that the marriage has in fact been so dissolved by judicial separation against the undisputed fact that both the plaintiff and second defendant are legally married in the year 1992 ... (at p 44 of the appeal record).

[17] It is trite law that where a document has been properly proved it must be marked as an exhibit. The documents which have been admitted need not be proved (see s 58 of the EA). Where a document has been properly tendered in evidence and marked as an exhibit the court must give its due consideration (see *Yeak Chie Chai v Gan Bee Aik* [1984] 1 MLJ 305).

[18] In the present case, the learned JC has clearly stated that the admissibility of documents referred to by the defendants to show that the marriage between the plaintiff and second defendant has been dissolved by judicial separation (*faraq*) is not an issue. In our view, if the admissibility of the documents is not an issue and marked as exhibits, it renders the documents as valid and the contents as proved. In such a case, the court must give due consideration the same. The contents stated therein are true and become undisputed facts. The facts in the documents show that the marriage between the plaintiff and second defendant had been dissolved by judicial separation (*faraq*).

[19] We now examine the documents which have been the subject matter of scrutiny by the court. The documents are: exh D41, the judgment or order by the Syariah Court of Appeal in the state of Kedah Darul Aman No 21/92 dated 24 August 1993 which pronounced the marriage between the plaintiff and second defendant is not valid according to 'syarak'; D44 which is the letter

from the Chief Registrar of the Syariah Judicial Department Negeri Kedah Darul Aman dated 26 April 2017 to the second defendant confirming that the order of the Syariah Court of Appeal No 21/92 dated 24 August 1993 is a valid order; and D42 which is the extract of marriage certificate (Borang 22) between the plaintiff and the second defendant which contains an endorsement at the bottom of the page stating that the marriage 'telah difaraqkan' (D45) by the Kadi Daerah Balik Pulau on 20 October 1993 in compliance with the order of the Syariah Court of Appeal (see pp 69, 76–78 of the common bundle of documents).

[20] We noted that all those documents mentioned above show that the marriage between the plaintiff and the second defendant has been dissolved by judicial separation (*faraq*). What was troubled the learned JC was the fact that DW2 could not confirm the authentiticity of the extract of the marriage certificate between the plaintiff and the second defendant produced by the latter which contains an endorsement stating that the marriage 'telah difaraqkan' (D45) by the Kadi Daerah Balik Pulau on 20 October 1993. In the absence of the original record, the learned JC was of the view that the extract of the said marriage certificate dated 6 January 2017 (P33) and the marriage certificate (P32) produced by the plaintiff which both do not bear the dissolution of marriage (*faraq*) are considered valid and undisputed. In the circumstances, he could not attach much weight to those documents produced by the second defendant to prove that the marriage had in fact been dissolved by judicial separation as against the undisputed fact that both the plaintiff and the second defendant were legally married in the year 1992.

[21] Further, the learned JC was of the view that the presumption under s 90 of the EA is not available to the defendants because those documents are not under the custody of DW2 since DW2 himself confirms that the record had been disposed of and that he merely examined the documents produced by the defendants of which he had no means to ascertain if they are in fact genuine documents. The learned JC concluded that there was no satisfactory evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation (*faraq*).

[22] The learned JC held that the finding is not a finding as to the validity of any order issued by Syariah Court but only to the extent of the weight to be attached to the documents purportedly issued by the relevant authorities (at p 59 of the judgment). It is quite difficult for us to appreciate this statement but we can only assume that the learned JC was not disputing that the Syariah Court Order is a valid order. In our view, if the order is accepted as valid, there is no reason to dispute its authenticity merely because the record of the original documents had been disposed of. The learned JC was only focused his mind to the marriage certificate produced by the plaintiff (exh P33 at p 89 of the

common agreed bundle) and the extract of the marriage certificate (exh P32 at p 91 of the common agreed bundle) which both do not bear the dissolution of marriage (*faraq*) without considering the contents found in D42, which is the certified copy of the extract of the marriage certificates (p 69 of the common agreed bundles) produced by the defendants. The endorsement at the bottom of the p of D42 clearly states that the marriage between the plaintiff and the second defendant 'telah difaraqkan' which has been marked as D45.

[23] The endorsement states that the 'Perkahwinan Telah Difaraqkan Oleh Kadi Daerah Balik Pulau Pada 20 October 1993 Berdasarkan Keputusan Mahkamah Rayuan Syariah Negeri Kedah (Rujukan Kami: Bil (2) DLM.JUPP/KB/1/001/JLD.3, bertarikh 6 Januari 1994). It is very clear that the endorsement was made in compliance of the Syariah Court order. The said order dated 24 August 1993 has also been produced and marked as D41. The learned JC also seems to have ignored other supporting documents. The exh D40 dated 6 November 1993 clearly states that Pejabat Kadi Daerah Barat Daya Pulau Pinang has on 20 October 1993 ordered the marriage to be dissolved 'di mufaraqkan' based on the order of the Syariah Court of Appeal (D41).

[24] We are of the view that in circumstances where a dispute arises as to the endorsement (D45) in the extract of marriage certificates (D42), the learned JC may enquire the presence of such endorsement, to satisfy himself. Had he done this, he would have found that the endorsement was entered based on the order of the Syariah Court of Appeal (D41) as to which he had no issue on its validity. It is prudent for the learned JC to have considered all the documents produced before him in light of the dispute to assertain whether the marriage had in fact been dissolved by judicial separation. The original marriage certificate for D42 with the endorsement (D45) may not be in the possession or custody of DW2, however, in our view, it does not mean the court must totally shut its door to other supporting documents which can establish the history of the case. It is not disputed that the documents are dated between 1992 and 1993 hence, it is possible for DW2 not being able to confirm without the benefit of the original record. For documents of this nature after lapse of years it would be impossible to give evidence that the statements contained therein are true.

[25] We are also of the view that the consistency of the matter would also depend on the oral evidence given by witnesess. During the cross-examination, the plaintiff said that he knew that the second defendant's father had filed an action at the Syariah Court to dissolve the marriage (see p 148 line 22–28, *Rekod Rayuan — Jld* 2 — *Bahagian* B). The defendants' witness, SD1 (the Chief Registrar of the Syariah Department) during cros-examination said that he made enquiries on the validity of the order of the Syariah Court of Appeal

(D41) (see p 344 line 19–30 *Rekod Rayuan* — Jilid 3 — Bahagian B). SD1 further said that during his tenure as the Chief Registrar, there was no incident of the court order having been falsified (see p 356 line 15–20 *Rekod Rayuan — Jld* 3 — *Bahagian* B). The learned JC has also acknowledged DW2's evidence who had seen D41 and confirmed the signatures of the Syariah Court of Appeal judges who made the order.

[26] The first defendant has submitted that by questioning the authenticity of D41 and requiring the maker to come foward to give evidence, the learned JC has placed too heavy a burden on the first defendant as if to attempt to go beyond the Syariah Court of Appeal order. He relied on the case of *Kaliammal a/p Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors* [2012] 2 SHLR 1; [2011] 2 CLJ 165 where YA Abdul Wahab Patail JCA said as follows:

> ... [12] Reverting to the issue at hand, a Syariah High Court has the power to hear and decide to make a declaration as to the status of a person as a Muslim. It is the court of competent jurisdiction for that purpose. This is established in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1992] 1 MLJ 1; [1991] 1 CLJ Rep 77; [1991] 3 CLJ 2768 (SC); *Soon Singh Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; [1999] 2 CLJ 5 (FC); *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 4 MLJ 585; [2007] 3 CLJ 557 (FC). In the light of these cases, *Ng Wan Chan* is no longer authority.
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> [13] As held in *Nor Kursiah Baharuddin v Shahril Lamin & Anor* [1997] 1 MLJ 537; [1997] 1 CLJ Supp 599 (HC) *and approved in Kamariah Ali lwn Kerajaan Negeri Kelantan, Malaysia & Satu Lagi dan Rayuan Yang Lain* [2002] 3 MLJ 657; [2002] 3 CLJ 766 (CA), it is not for the civil court to go behind that order of the court of competent jurisdiction to question the merits of the matter decided upon by that court. It is therefore not for the civil court to look behind the order and say whether the Syariah High Court acted correctly or not and to interfere with its decision ...

[27] We may add that a judgment of the court is a public document under s 74 of the EA (see *Zainal bin Kuning & Ors v Chan Sin Mian Michael & Anor* [1996] 3 SLR 121 (CA). In *Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201 (FC), where it was held that the absence of the author of a public document under ss 74 and 78 of the EA from giving evidence does not in any way affect its admissibility. Those documents are relevant public records made in the performance of a public duty under s 35 of the EA. Thus they are admissible as an exception to the hearsay rule (see *Evidence, Practice and Procedure* (4th Ed) Agustine Paul at pp 427–428).

[28] The learned JC says that his finding is only to the extent of the weight to be attached to the documents purportedly issued by the relevant authorities. In our view, had the learned JC applied his mind properly, he would have

noticed that those documents issued by the relevant authorities are in fact, documents issued by a government department. The documents show the judicial and official acts which have been performed. It is trite law that the court may presume the existence of any fact which it thinks likely to have happened in relation to the facts of the particular case that judicial and official acts have been regularly performed (see s 114(e) of the EA). The words 'regularly performed' means correctly done (see *Commissioners of the Municipality of Malacca v Sinniah* [1974] 1 MLJ 77). The section also states that the court is required to have regard to the fact that 'judicial act, the regularity of which is in question was performed under exceptional circumstances'. Once the presumption arises, the official act will be presumed to have been regularly done until the contrary is proved (see *Evidence, Practice and Procedure* (4th Ed) Agustine Paul at p 908). Peh Swee Chin in *Loo Keck Leong v Public Prosecutor* [1992] 2 MLJ 177 at p 182 (SC) held that the presumption is of course a rebuttable and optional presumption, based upon the common experience of mankind. It is inapplicable having regard to the facts and circumstances of each case, and especially the absence of objection from the party to whom such presumption could be detrimental.

[29] In the present case, the documents were admitted and marked as exhibits. We fail to see in the judgment that the admissibility of those documents had been objected to by the plaintiff. In fact, Agustine Paul at p 659 explained that any objection to the admissibility of secondary evidence should be raised before it is admitted in evidence. In the circumstances of the present case, it is our considered view that presumption under s 114(e) of the EA is applicable to those documents.

[30] In *Dow Jones Publishing Company (Asia) Inc v Attorney General* [1989] 2 MLJ 385 (CA) it was held that where the Minister acted on powers under the Newspaper and Printing Presses Act to restrict the circulation of the plaintiff's publication, it can be presumed that any order he makes is valid until it is proved otherwise. In *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233 it was held that where a banktrupcy notice is issued by a registrar it must be presumed, in the absence of evidence to the contrary, that the Chief Justice had duly delegated his powers to the Registrar. In *In the matter of Enactment No 10 of 1922, the judgments (reciprocity) Enactment; Ho Hong Bank Ltd v Ho Kai Neo & another* [1932] 1 MLJ 76 it was held that a court in Johore should presume that a judgement obtained in Singapore was a binding judgment properly obtained. In *Mohd Nazir bin Badar Shair v Timbalan Menteri Dalam Negeri* [2000] 2 MLJ 559 it was held that the signature of a commissioner of oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved.

[31] Similarly, in the present case, the order of Syariah Court of Appeal (D41) adjudicating that the marriage between the plaintiff and second defendant is not valid according to 'syarak' must be presumed to have been made within the court's powers and is valid until it is proved otherwise. The Syariah Court of Appeal first sat on 22 June 1993 to allow parties to produce the letter from Kadi Daerah Barat Daya Pulau Pinang dated 30 June 1993 regarding the marriage between the plaintiff and the second defendant. It was then produced and after careful scrutiny of the said letter, the court found that the marriage had not been solemnised according to 'syarak'. The judicial act of the panel judges of the Court of Appeal had been regularly performed. The decision was conveyed to the Kadi Besar, Pejabat Kadi Negeri Kedah on 6 November 1993 and copied to Kadi Besar Pulau Pinang (D40). There is no evidence to suggest that the Syariah Court of Appeal order is a fraudulent document or has been falsified. The order remains valid until set aside.

[32] Further, the letter from the Syariah Judicial Department (D44) confirming the validity of D41 and supported by D40 must be presumed to have properly issued by the officer of the department and the endorsement made in the marriage certicate of the plaintiff and the second defendant (D45) that the marriage has been dissolved (difaraqkan') based on the decision of the Syariah Court of Appeal must be presumed has been properly issued by the officer having such power to make such endorsement following the process. In our view, all this shows the existence of a fact which is likely to have happened which the court may presume by invoking s 114(e) of the EA.

[33] Exhibit D42 which contains the endorsement that the marriage between the plaintiff and the second defendant has been dissolved (difaraqkan') (D45) is a certified true copy. The critical question is whether the failure to object to the admissibility of an improperly certified document when it was tendered in evidence at the trial can be challenged on appeal. It was held that, where the mode of proof in respect of a document tendered as irregular or insufficient in the sense that it has been erroneously allowed to be proved in a manner different from which the law requires without objection, such objection cannot be taken at the appellate stage. The rationale underlying the rule is that the failure to object amounts to a waiver of the objection to the admissibility of the document. It amounts to an implied admission of the objection waived. An implied admission amounts to an express admission within the meaning of s 58 of the EA (see *Evidence, Practice and Procedure* (4th Ed) Agustine Paul at pp 727–728).

[34] In the circumstances of the above finding, we are satisfied there is sufficient evidence to show that the marriage between the plaintiff and the

second defendant has been dissolved by judicial separation 'di mufaraqkan' on 20 October 1993 based on the order of the Syariah Court of Appeal (D41) dated 24 August 1993.

CONCLUSION

[35] We find merit in the first defendant's appeal. It is our unanimous decision that the appeal should be allowed with costs of RM15,000 subject to allocator. We thus set aside the order of the High Court.

[36] The learned JC has ruled that the first defendant's counterclaim for defamation is dependent on whether or not the plaintiff's claim could succeed. If the plaintiff succeeds in his claim, the letter written by the plaintiff could not be defamatory to the first defendant on the basis of justification. Since we have allowed the appeal, we have also ordered that this case be remitted to the High Court for assessment of damages for the first defendant's counterclaim.

Appeal allowed with costs of RM15,000.

Reported by Kohila Nesan